Filed 7/1/19 Wentworth v. Hemenway CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BLAKE WENTWORTH,

Plaintiff and Appellant,

v.

NICOLE HEMENWAY,

Defendant and Appellant.

A154511

(Alameda County Super Ct. No. RG16831932)

MODIFICATION AND DENIAL OF PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

Appellant Blake Wentworth's petition for rehearing, filed June 18, 2019, is denied. The unpublished slip opinion, filed June 5, 2019, is modified as follows:

On page 20 of the slip opinion, at the end of subsection II.C.10 (ending with "not likely to harm his reputation"), the following text is inserted:

> Wentworth contends in a petition for rehearing that this result is effectively an application of the "incremental harm doctrine," which has never been recognized by a California court and which is inconsistent with the principle that nominal damages are required for libel on its face when actual damages cannot be shown. (*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 522–523 (*Mason I*); *Mason v. New Yorker Magazine, Inc.* (9th Cir. 1992) 960 F.2d 896, 898–899 (*Mason II*); *Silk v. Feldman* (2012) 208 Cal.App.4th 547, 555–556 (*Silk*).) Under the incremental harm doctrine, when unchallenged or non-actionable parts of a particular publication are damaging, another statement, though maliciously false, may not be actionable because

it causes no harm beyond the harm caused by the remainder of the publication. (*Masson I*, at pp. 522–523.) The incremental harm doctrine "measures the incremental harm inflicted by the challenged statements beyond the harm imposed by the rest of the publication. If that harm is determined to be nominal or nonexistent, the statements are dismissed as not actionable." (*Herbert v. Lando* (2d Cir. 1986) 781 F.2d 298, 311 (*Herbert*).)

Thus, in *Herbert, supra*, 781 F.2d at 312, after determining that defendants were entitled to summary judgment with respect to nine of eleven alleged defamatory statements, the court dismissed the claims as to the remaining two statements because they conveyed "the same view" and were "simply an outgrowth of and subsidiary to" the ideas conveyed in the nine dismissed statements. Although the United States Supreme Court has rejected the idea that the incremental harm doctrine is constitutionally required under the First Amendment, it expressly recognized that state courts are free to adopt the doctrine as a matter of state tort law. (*Masson I, supra*, 501 U.S. at p. 523.) The Ninth Circuit has concluded the incremental harm doctrine has not been adopted under California law. (*Masson II, supra*, 960 F.2d at p. 898.) The jurisdictions that have rejected the incremental harm doctrine have sometimes intertwined it with the "libel-proof plaintiff" doctrine, which precludes a plaintiff's recovery for libel if his or her reputation up to the time of the challenged publication has been "irreparably stained by prior publications." (*Liberty Lobby, Inc. v. Anderson* (D.C. Cir. 1984) 746 F.2d 1563, 1568, revd. on other grounds by *Anderson Liberty Lobby, Inc*., (1986) 477 U.S. 242.) The libel-proof plaintiff doctrine has been criticized because the fact that an individual has done one bad thing does not necessarily mean the individual has done another entirely separate bad act. (*Ibid.* ["the theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us—or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. . . . [e]ven the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential"].)

Here, we do not find Statement G1 non-actionable because of Wentworth's reputation apart from that article, nor is the issue whether a statement within an article can be defamatory when the plaintiff's reputation has already been tarnished by different statements within that same article. Rather, Statement G1 summarizes and characterizes those statements for which there can be no recovery. The unchallenged, privileged or otherwise non-actionable statements in the Guardian UK article describe Wentworth's conduct toward Hemenway. Statement G1 gives a name to the same conduct described by those other statements by characterizing Wentworth's actions as "sexual advances." Statement G1 did no more than convey the same allegation that was contained in the unchallenged, privileged or otherwise non-actionable statements.

We therefore conclude that the characterization of Wentworth's conduct as "sexual advances" is not actionable as a matter of law. The "words merely imply the same view and are simply an outgrowth [of] and subsidiary to those claims upon

which it has been held there can be no recovery." (*Tonnessen v. Denver Publishing Co.* (Colo. Ct.App. 2000) 5 P.3d 959, 966.) We do not hold the incremental harm doctrine to be generally applicable in California; we merely hold that in this very limited circumstance—when the allegedly defamatory statement merely parrots other non-defamatory statements in the same publication without adding additional facts—the plaintiff cannot prevail.

This does not conflict with the principle of libel on its face, statutorily defined as "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact. . . ." (Civ. Code, § 45a.) In the absence of proof of actual damages, nominal damages are awarded and damage to reputation is presumed. (*Silk, supra*, 208 Cal.App.4th at p. 556; *ZL Technologies, Inc. v. Does 1-7* (2017) 13 Cal.App.5th 603, 631–632.) If the challenged communication was different from non-actionable statements in the same communication, we would be required to presume damages in a case of libel on its face, even if actual damages were not proven. But when a statement simply repeats that which is non-actionable, the doctrine of libel on its face does not require that we treat the statement differently than those other non-actionable statements.

There is no change in the judgment.

Date:_____ _____ P.J.

Filed 6/5/19 Wentworth v. Hemenway CA1/5 (unmodified opinion)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BLAKE WENTWORTH, Plaintiff and Appellant, v. NICOLE HEMENWAY, Defendant, and Appellant.	A154511 (Alameda County Super. Ct. No. RG16831932)

Nicole Hemenway appeals the partial denial of a motion brought under Code of Civil Procedure[1] section 425.16 (or the anti-SLAPP statute) that she filed in response to Blake Wentworth's allegations of defamation, false light publicity and intentional infliction of emotional distress. She contends the trial court should have granted the motion in its entirety and dismissed the action. Wentworth has filed a cross-appeal, contesting the trial court's decision to strike all but one of the allegations in the compliant. We agree with Hemenway that the entire action must be dismissed.

I. BACKGROUND

In 2012, the University of California at Berkeley (the University) hired Wentworth as an assistant professor in the Department of South & Southeast Asian Studies (SSEAS). In 2014, Hemenway, an undergraduate, asked him to be her thesis advisor. She graduated in 2015.

[1] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

In 2014 and 2015, undergraduate students Erin Bennett and Kathleen Gutierrez complained about Wentworth's inappropriate behavior. The University's Office for Prevention of Harassment and Discrimination (OPHD) ultimately determined that Wentworth had violated the University's sexual harassment policy with respect to his conduct toward Gutierrez.

Hemenway came forward with a similar description of Wentworth's behavior in April 2016, after she read accounts regarding Bennett and Gutierrez. She filed a complaint with the Department of Fair Employment and Housing (DFEH) against Wentworth and the University on May 19, 2016.

The gist of the complaint by Hemenway was that Wentworth engaged in conduct that was inappropriate in the context of a professor-student relationship. According to the complaint, he frequently "overshared" details about his personal life, offered unnatural and excessive praise, promised to use his connections to get her into other programs where she wanted to study, and once offered to drive her alone to Palo Alto (where her parents lived). It asserts that in November 2014, Wentworth told Hemenway a complaint had been made against him and some faculty had expressed concern that he was spending so much time with Hemenway. He apologized if he had ever made Hemenway uncomfortable, cried, and said he could lose his job. According to the complaint, Wentworth said Hemenway was "a gorgeous young woman" who would be an "obvious target" for sexual harassment. He was alleged to have maligned other faculty members, isolated Hemenway from the rest of the SSEAS faculty, and made her his confidante regarding the sexual harassment accusations against him, making threats of violence against those who had complained about his conduct. The complaint alleged that during a meeting in February 2015, Wentworth repeatedly called Hemenway "honey" or "honey bear," and implied they could have a sexual relationship after her May 2015 graduation. Hemenway did not feel she could apply to Berkeley for graduate school as long as Wentworth continued to teach there and she felt her ability to apply to other graduate programs had been compromised.

On May 27 and June 2, 2016, respectively, articles were published in the Guardian UK and the Daily Californian newspapers which described Hemenway's alleged experience with Wentworth. The Guardian UK article was entitled, " 'Honey Bear': Berkeley student details alleged sexual advances by professor." It described the encounter with Wentworth where he told her other students had complained about his conduct, noted that he referred to her as a " 'gorgeous young woman,' " noted that Hemenway was the latest woman to "take legal action against a powerful male faculty member," and stated, "[i]n her first interview about [this] case, Hemenway described how Wentworth's treatment of her and his sexual advances derailed her studies and how the school failed to protect her." The article noted that Hemenway's DFEH complaint and emails shared with the Guardian "paint a picture of a professor who frequently behaved inappropriately and unprofessionally with a student he was advising—escalating to sexual advances that made it very challenging for her to finish school." The article mentioned that 19 employees of the University had substantiated claims of misconduct against them, that other faculty members had been guilty of such conduct, and that Wentworth had "initiated personal conversations with" Hemenway, had discussed sexual harassment allegations he was facing from others, had forwarded her emails from others about the harassment claims, had mocked the allegations, had repeatedly referred to Hemenway as " 'attractive' " and a " 'shining star,' " and had repeatedly called her " 'honey' " and " 'honey bear' " "and put his hands on her while complimenting her and staring intensely into her eyes." The article stated that Hemenway feared if she rejected his advances she would lose opportunities and he would be enraged. The articles indicated that Wentworth denied the allegations.

The article in the Daily Californian was entitled, "Campus graduate adds to the allegations of sexual harassment." It indicated that in a "lawsuit" filed May 19, (there was no lawsuit, only the DFEH complaint), Hemenway had accused her former thesis adviser, Wentworth, of sexual harassment. It quoted her counsel as saying the University needs to have a clear and transparent process to deal with such complaints, that faculty should not be on campus while a complaint is pending, and that faculty members had sent

a letter condemning the University administration for slowness in investigating a case of sexual harassment. It reiterated that Wentworth had spoken to Hemenway about sexual harassment complaints against him; noted that he had called her a "gorgeous young woman" and said she was an "obvious target" for sexual harassment; quoted an email from Wentworth to another faculty member that he had forwarded to Hemenway to the effect that if he wanted to mess around with other women he was from the area and knew people; quoted an email from Wentworth to Hemenway to the effect that "[m]idle-aged men with gossipy tongues" should not impede a career; and stated that Hemenway said she did not report Wentworth's behavior because she relied on his recommendation to get into graduate programs.

An investigation was conducted by the OPHD, which concluded the complaint by Hemenway was true and that Wentworth had (1) blurred professional lines in their relationship; (2) threatened other complainants in a way that caused her to fear protesting his behavior; (3) created a division between Hemenway and other members of the SSEAS Department; and (4) used his position to provide special assistance and cause Hemenway to believe she had to maintain a close relationship to further her educational opportunities. Following a hearing on the complaints of Hemenway and others in December 2016, the hearing committee concluded Wentworth had sexually harassed four students.

Wentworth was terminated on May 24, 2017, for violating the University's policy against sexual harassment as to four students, including Hemenway. In June 2017, Hemenway participated in a mediation conducted by DFEH and settled her claims against the University for $56,250.

Wentworth filed the current action against Hemenway.[2] The first amended complaint was filed June 8, 2017, and states three causes of action for defamation, false

[2] Wentworth filed a separate action against Bennett, Gutierrez and their lawyers. A different division of this Court has affirmed an order in that case dismissing a claim for abuse of process and concluding that four out of five claims had minimal merit under the

light publicity and intentional infliction of emotional distress, based on a total of nine statements Hemenway made to the newspapers in 2016. The first amended complaint alleged Hemenway stated the following in the articles:

G1[3]: "Wentworth's 'treatment of her and his sexual advances derailed her studies;"

G2: "[S]he was allowed to sign up for an independent thesis with the professor despite the fact that officials knew of numerous misconduct allegations against him;"

G3: Wentworth " 'made it very challenging for her to finish school;' "

G4: Wentworth frequently wrote "intimate messages about his feelings;"

G5: Hemenway " 'tried to brush aside his behavior;' "

G6: Hemenway " 'would've done anything not to go to graduation;' "

G7: Wentworth "pressur[ed] her to have an intimate relationship, implicitly conditioned on assistance with graduate school applications;"

D1[4]: Hemenway " 'felt uncomfortable around Wentworth and wanted to skip her graduation ceremony in order not to see him;' "

D2: Hemenway was " 'placed in fear of entering the Berkeley campus, prevented from fully completing her honors thesis and her ability to be accepted into graduate school in her chosen field of South Asian Study was harmed.' "

Hemenway filed an anti-SLAPP motion arguing that the entire complaint should be dismissed because each cause of action was entirely predicated on conduct protected under section 425.16, and there was no reasonable probability Wentworth would prevail on his claims. Wentworth opposed the motion, arguing that Hemenway's conduct was not protected and that the available evidence showed his claims had sufficient merit to proceed. He submitted a declaration in opposition to the motion in which he stated,

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anti-SLAPP statutes. (*Wentworth v. Bennett et al.*, (July 23, 2108, A151689) [nonpub. opn.].)

[3] "G" indicates statements allegedly made in the Guardian UK article.

[4] "D" indicates statements allegedly made in the Daily Californian article.

among other things, "I absolutely and unequivocally deny ever asking or suggesting to Hemenway that we should have a romantic or intimate relationship of any kind, before or after her graduation. At no time did Hemenway state or insinuate in any way that I made her uncomfortable. At no time did Hemenway give any indication that our interactions were uncomfortable. On the contrary, her actions were pleasant and friendly, she asked for support and thanked me for receiving it, and she participated enthusiastically in our meetings discussing her work." Describing his conversation with Hemenway regarding an anonymous complaint of harassment in November 2014, he stated, "I did not tell Hemenway that she was a 'gorgeous young woman,' that she was a 'target' for harassment, or anything of the sort. . . . I did not say that sexual harassment complaints had been made against me. I told Hemenway that if she wanted, I would help her find another advisor, and she could still count on my high recommendations." Wentworth also denied holding Hemenway's hand, calling her "honey" or "honey bear," or proposing or discussing any relationship after her graduation, as was alleged by Hemenway to have occurred in February 2015. According to Wentworth's declaration, the conduct alleged by Hemenway in the Daily Californian "amounted to sexual harassment. Her statements are false."

Among the exhibits to Wentworth's declaration were emails between him and Hemenway in which both of them shared personal information. In November 2014, Hemenway had shared she was "going through a little rough patch recently" and was "crying uncontrollably" at times, and requested a recommendation for therapists. Wentworth shared, "As for me, I have such an exciting cocktail of dark karma, touched with a soupcon of real despair, I'm not sure how I get up sometimes. Perhaps with my unique blend of profane honesty and I DON'T GIVE A FUCK. All of which is a silly lie. [¶] But you – are you okay? I'm on your side, and like it or not, I've seen enough of you students come and go to KNOW you're going to succeed in this wretched sham of a life." He referred to her repeatedly as a "shining star" or "superstar." They discussed the anonymous sexual harassment accusation against him and he showed her a draft of his email to the department chair. On November 22, 2014, Hemenway wrote, "What if I

went to [the department chair] and said that [another professor in the department] came onto me just because I felt like stirring shit up? That's such a despicable thought, and that's exactly what they're doing." On the same date, she wrote, "Another problem with the way they handled this is that the more fake allegations that people raise, the more it belittles the real ones. It's entirely disrespectful towards actual sexual assault survivors for [another faculty member] and/or [the department chairperson] to cry wolf over nothing. . . . If they were concerned that our relationship was possibly *becoming* inappropriate, they should have expressed concern and care for me and my well-being, and presented it as that concern. It's a serious failure in society when the main concern around sexual assault is a lawsuit and bad publicity."

The trial court granted the motion in part and denied it in part, and struck all the allegations noted above with the exception of G1, which alleged that Hemenway told the Guardian UK that "Wentworth's 'treatment of her and his sexual advances derailed her studies.' " It did not strike the three causes of action to the extent they were based on this allegation. As noted, Hemenway contends the court erred by failing to strike allegation GI and dismiss the first amended complaint in its entirety and Wentworth argues the court erred by striking allegations G2 through D2.

II. DISCUSSION

A. *Anti-SLAPP Statute: General Principles*

The anti-SLAPP pretrial motion is derived from section 425.16, a statute enacted to prevent the chilling effect of meritless lawsuits which force an individual into litigation for exercising the right of petition or free speech. Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Section 425.16, subdivision (e) provides, "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or

California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

The anti-SLAPP statute's purpose is to "[weed] out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) An anti-SLAPP motion involves a two-step process. In the first step, the defendant must make " ' "a threshold showing that the challenged cause of action is one 'arising from' protected activity." ' " (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321 (*Barry*); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) In this context, the term "protected activity" refers to speech or petitioning activities. (*Barry*, at p. 321.)

If the court finds the defendant succeeds at the first step, then the burden shifts to the plaintiff to " ' "demonstrate[ ] a probability of prevailing on the claim." ' " (*Barry, supra*, 2 Cal.5th at p. 321.) At the second step, the court " ' " 'accept[s] as true the evidence favorable to the plaintiff [citation] and evaluate[s] the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' " ' " (*Ibid.*) The plaintiff cannot rely solely on its complaint to satisfy its burden on the second step; it must provide competent admissible evidence that would be sufficient to sustain a favorable judgment. (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 376.) However, the court's inquiry is limited to "whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. . . . [C]laims with the requisite minimal merit may proceed." (*Baral*, *supra*, 1 Cal.5th at pp. 384–385.)

If a cause of action satisfies both prongs of the anti-SLAPP statute, then it is subject to being stricken. (*Barry, supra*, 2 Cal.5th at p. 321.) Allegations that are merely a subpart of a pleaded cause of action may also be stricken, as with a conventional motion to strike. (*Baral*, *supra*, 1 Cal.5th at p. 393; *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 589 (*Okorie*).) Therefore, an anti-SLAPP motion need not be directed to an entire cause of action but may directed to "component paragraphs, words or phrases." (*Okorie*, p. 589.) The court in *Baral* noted: "At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. . . . If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Id*. at p. 396.)

We review the trial court's ruling on an anti-SLAPP motion de novo, following the same two-step process outlined above. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*); *Cabral v. Martins* (2009) 177 Cal.App.4th 471, 478.)

B. The Causes of Action Arise from Protected Conduct[5]

The trial court found the statements attributed to Hemenway in the Guardian UK and Daily Californian articles constituted protected activity under section 425.16, subdivision (e)(3) or (4), which apply to statements made "in connection with an issue of public interest" or "in connection with a public issue." We agree.

The anti-SLAPP statute does not define the terms "public issue" or "issue of public interest" as those terms are used in section 425.16, subdivision (e)(3) and (4). (§ 425.16.) However, courts have held that there must be " 'some attributes of the issue which make it one of public, rather than merely private, interest. A few guiding principles may be derived from decisional authorities. First, "public interest" does not equate with mere curiosity. [Citations.] Second, a matter of public interest should be something of concern to a substantial number of people. [Citation.] Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. [Citations.] Third, there should be some degree of closeness between the challenged statements and the asserted public interest [citation]; the assertion of a broad and amorphous public interest is not sufficient [citation]. Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort "to gather ammunition for another round of [private] controversy. . . ." [Citation.] Finally, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." [Citation.] A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number

[5] Wentworth argued below that Hemenway's activities were illegal as a matter of law and that consequently, the anti-SLAPP law did not apply. (*Flatley*, *supra*, 39 Cal.4th at p. 320.) Hemenway addresses the issue in her appeal, as did the trial court in its order, but Wentworth has not raised the argument in his cross-appeal and the issue is now forfeited. (See *Trabuco Highlands Community Ass'n. v. Head* (2002) 96 Cal.App.4th 1183, 1192, fn. 10.) In any event, the argument appears to lack merit as the exception for illegality applies only when the defendant concedes the illegality or there is conclusive proof demonstrating it. (*Laker v. Board of Trustees of California State University* (2019) 32 Cal.App.5th 745, 761–762.) Hemenway does not concede she engaged in illegal conduct and such conduct was not conclusively proved on the record.

of people.' " (*Baughn v. Department of Forestry & Fire Protection* (2016) 246 Cal.App.4th 328, 335–336.)

Wentworth argues that the statements on which his claims are based involve a private controversy, rather than an issue of public interest. However, as the trial court noted, the article reported not only Hemenway's allegations regarding a private matter, but also how the University had failed to protect her and other targets of sexual harassment and how she was the latest woman to make allegations against a male faculty member and was part of a scandal which had ignited a debate about sexism in academia. As such, her statements concerned sexual harassment on public college campuses and the colleges' response to the same, issues that are of considerable interest to the public and affect a sizable population—including the thousands of students throughout the state who attend the University of California. (Cf. *Olaes v. Nationwide Mutual Ins. Co.* (2006) 135 Cal.App.4th 1501, 1509 [private corporation's procedure for investigating sexual harassment not comparable to government agency's]; *Abuemeira v. Stephens* (2016) 246 Cal.App.4th 1291, 1298 [video of altercation between private parties not turned into issue of public interest by defendants' attempts to publicize it]; *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1547 [communications regarding inappropriate relationship of youth pastors to one of their charges "clearly involved" public interest in protecting children from sexual predators, particularly in places such as church programs].)

Plaintiff relies on *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924–926 (*Rivero*) and argues the fact the University is involved is irrelevant. In that case, a janitorial supervisor at the University filed an action against a union, alleging, inter alia, libel and slander, after the union published information about him in union publications and a petition. (*Id.* at pp. 916–917.) Our colleagues in Division Two observed that the union's statements concerned supervision of eight custodians by the plaintiff, "an individual who had previously received no public attention or media coverage. Moreover, the only individuals directly involved in and affected by the situation were [the plaintiff] and the

eight custodians. [The plaintiff's] supervision of those eight individuals is hardly a matter of public interest." (*Rivero*, at p. 924.) The present case is distinguishable in that the challenged statements were made in a newspaper article that was addressing the broader issues of sexual harassment in academia and a prominent public institution's allegedly lax enforcement of sexual harassment violations. The trial court's determination that statements G1 to G7 were protected activity under section 425.16, subdivision (e)(3) and (4) was correct.

The statements made to the Daily Californian similarly were "in connection with an issue of public interest" or "in connection with a public issue" within section 425.16, subdivision (e)(3) and (4), for the reasons previously stated. Additionally, the statements are protected under section 425.16, subdivision (e)(1) and (2), as statements made "before . . . any other official proceeding authorized by law," or "in connection with an issue under consideration or review by . . . any other official proceeding authorized by law." It appears that those statements identified in the first amended complaint were reported by the article as having been alleged in the lawsuit (actually a DFEH complaint), and there is no indication the statements were made in an interview or some other process outside of the complaint filed with the DFEH. For these reasons, the trial court properly found that all of the statements at issue were protected, thus shifting the burden to Wentworth to establish a reasonable probability of prevailing on his claims. (*Baral, supra*, 1 Cal.5th at p. 396.)

C. *Reasonable Probability of Prevailing*

The trial court concluded that all but one of the statements identified in the complaint—G1—should be stricken because Wentworth did not have a probability of prevailing on his claims based on those statements. Effectively, this was a ruling that all three causes of action could be based on allegation G1 alone. Hemenway argues the court should have stricken G1 and with it, the entire complaint, while Wentworth argues that the entire complaint should have been allowed to stand. As we explain, we agree with Hemenway. We discuss the elements of each cause of action, and then discuss each

allegation in turn. We address allegation G1 last because the other allegations provide context for our determination that it should have been stricken.

1. Elements of Wentworth's Causes of Action Against Hemenway

To begin with, we consider the elements of each cause of action raised by Wentworth. All are predicated on the theory that Hemenway made false statements about his conduct to the Guardian UK and Daily Californian reporters who interviewed her, knowing they would disseminate those statements in articles they wrote.

Defamation requires a publication that is false, defamatory, unprivileged, and has a tendency to injure or cause special damage. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720 (*Taus*); Civ. Code, §§ 44, 45.) To establish his defamation claim, plaintiff must prove the publication contained a statement of fact (which can support a defamation action) rather than an expression of opinion (which cannot). (*Taus* at p. 720.) "In drawing the distinction between opinion and fact ' "California courts have developed a 'totality of the circumstances' test. . . . [Citation.] The court must put itself in the place of " ' "an average reader" ' " and decide the " ' "natural and probable effect" ' " of the statement. [Citations.] The words themselves must be examined to see if they have a defamatory meaning, or if the " ' "sense and meaning . . . fairly presumed to have been conveyed to those who read it " ' " have a defamatory meaning. [Citations.] Statements " ' cautiously phrased in terms of apparency' " are more likely to be opinions. [Citations.] [¶] In addition to the language, the context of a statement must be examined. [Citation.] The court must "look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. " ' (*Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 578.)

Whether an alleged defamatory statement is a verifiable fact or opinion is ordinarily a matter of law for the trial court. (*Campanelli*, *supra*, 44 Cal.App.4th at p. 578; *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260.) Only when a reasonable person could construe the statement as either fact or opinion should the resolution of the matter be left to the jury. (*Campanelli*, at p. 578.) Under a totality of the circumstances standard, " 'the court must "look at the nature and full content of the

communication and to the knowledge and understanding of the audience to whom the publication was directed." ' " (*Id*. at p. 578.) Further, "[i]n considering the totality of the circumstances, the court must factor into the equation the extent to which the public is legitimately concerned with the issue discussed, that is to say, whether the matter is one of public concern." (*Id*. at pp. 580–581.) Truth is an absolute defense to any charge of defamation. (*Id*. at p. 581.)

To establish a false light invasion of privacy claim, a plaintiff must meet the same requirements as in defamation. (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35, fn. 16; *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 149.) " 'One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.' " (5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 781, p. 1078.)

Wentworth's cause of action for intentional infliction of emotional distress is based on the same assertedly false and defamatory statements as those underlying his defamation and false light invasion of privacy claims. The elements of the tort of intentional infliction of emotional distress are: " '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. [Citations.] . . . Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' " (*Davidson v. City of Westminister* (1982) 32 Cal.3d 197, 209.) The defendant must have engaged in "conduct intended to inflict injury or engaged in with the realization that injury will result." (*Id*. at p. 210.) Whether a defendant's conduct becomes "outrageous" normally presents an issue of fact, but "the court may determine in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and

outrageous as to permit recovery." (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.)

2. Fair and True Reporting Privilege

Under Civil Code section 47, subdivision (d), the fair and true reporting privilege, protects a "fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued." "It [] is an absolute privilege—that is, it applies regardless of the defendants' motive for making the report—and forecloses a plaintiff from showing a probability of prevailing on the merits." (*Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 787 (*Argentieri*), citing *J –M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 98 (*J–M*).)

In determining the applicability of the fair and true reporting privilege, " ' "[t]he report is not to be judged by the standard of accuracy that would be adopted if it were the report of a professional law reporter or a trained lawyer.' " [Citation.] It is sufficient if the statement conveys the 'gist' of the action, as measured by ' "how those in the community where the matter was published would reasonably understand it." ' " (*Argentieri, supra*, 8 Cal.App.5th at p. 790.) A statement need not track the underlying proceeding verbatim, and the privilege will only be suspended if the communication produces a different effect on the reader than the proceeding itself. (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 351.)

3. Statement G2

Wentworth alleges that Hemenway "claimed that she was 'allowed to sign up for an independent thesis with the professor despite the fact that officials knew of numerous misconduct allegations against him.' " As the trial court properly found, this statement was not "of and concerning" Wentworth, as it targeted the University's conduct in

allowing Hemenway to sign up for independent study with a professor who was under investigation. (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042.)[6]

4. Statement G3

Statement G3 was, "Hemenway stated that [Wentworth] 'made it very challenging to finish school.' " We agree this was a statement of opinion, rather than a provably false statement of fact, and is therefore not actionable. (*J-M Manufacturing, supra*, 247 Cal.App.4th at p. 100; *Campanelli*, *supra*, 44 Cal.App.4th at pp. 577–580.) Whether Wentworth made it "challenging" for Hemenway to finish school "inherently connotes a subjective judgment." (*Campanelli*, at p. 579.) But in any event, the actual statement in the Guardian UK article shows that it was taken from the DFEH complaint: "Hemenway's complaint with the California [D]epartment of [F]air [E]mployment and [H]ousing, along with extensive emails shared with the Guardian, paint a picture of a professor who frequently behaved inappropriately and unprofessionally with a student he was advising – escalating to sexual advances that made it very challenging for her to finish school." The article was a fair and true report of that complaint, and as such was absolutely privileged under Civil Code section 47, subdivision (d).
(Cf. *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 280–283 (*Hawran*) [press release that did not mention pending investigation by the Securities and Exchange Commission was not privileged under Civ. Code, § 47, subd. (d)].)

Wentworth argues we should not give effect to this privilege because Hemenway is a student rather than an employee of the University, and therefore could not prevail in a lawsuit brought under the Fair Employment and Housing Act (FEHA). He asserts she consequently "opted to quickly withdraw the DFEH charge." (Gov. Code, 12900 et seq.; *Shephard v. Loyola Marymount Univ.* (2002) 102 Cal.App.4th 837, 845–846.) The case on which he relies, *Burrill v. Nair* (2013) 217 Cal.App.4th, 357, 375, 397–398, overruled

[6] It is unnecessary to consider the trial court's ruling that that statement should also be stricken because Wentworth did not carry his burden of showing the statement was false given that only one student (Bennett), rather than "numerous" students, had complained at that point.

on other grounds in *Baral, supra*, 1 Cal.5th at p. 391, is distinguishable because it involved a citizen's criminal complaint on which no action was taken by governmental authorities. Here, the DFEH took action on Hemenway's complaint because it issued a right-to-sue notice in response, a fact Wentworth acknowledges.

5. Statement G4

Statement G4 was, "She accused [Wentworth] of 'frequently' writing 'intimate messages about his feelings.' " As the trial court properly found, the statement in the Guardian UK article was not Hemenway's characterization of the emails with Wentworth, but that of the reporter who reviewed them: "Emails reveal that Wentworth also invited [Hemenway] on a one-on-one walk in the woods and a car ride, and that he frequently wrote her intimate messages about his feelings." Statement G4 also did not contain a provably false statement as opposed to an opinion—a subjective judgment—that the emails were "intimate." (See *John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1318–1319 [vague and amorphous statements about whistle-blowing, bad business practices and feeling burned were statements of opinion] *Campanelli, supra*, 44 Cal.App.4th at pp 577–580 [statements that conduct was making students sick was statement of opinion].) Moreover, having reviewed the messages that are part of the record, we do not see how Wentworth could prove that the article's characterization of the email messages was false—even if reasonable people could disagree as to whether Wentworth's sharing of certain information was unwelcome or amounted to "harassment," portions were unquestionably "intimate." (*Hawran, supra*, 209 Cal.App.4th at p. 293 [truth is complete defense to defamation claim].)

6. Statement G5

Statement G5 was, "Hemenway claimed to have 'tried to brush aside his behavior.' " This, like the trial court found, is a statement of opinion rather than a provably false statement of fact. (See *J-M Manufacturing, supra*, 247 Cal.App.4th at p. 100.) Wentworth's interpretation of Hemenway's conduct was that she gave him no indication his interactions with her were unwelcome. But "brushing aside" another person's behavior can involve completely ignoring it. Whether Hemenway brushed aside Wentworth's behavior was a matter of opinion and the statement claiming she had done so was not actionable.

7. Statement G6

Statement G6 was, Hemenway "stated that she 'would've done anything not to go to graduation.' " This, as the trial court correctly found, is a statement of opinion rather than a provably false statement of fact. (See *Campenelli*, *supra*, 44 Cal.App.4th at pp. 578–580.)

8. Statement G7

Statement G7 was, "Hemenway accused [Wentworth] of pressuring her to have an intimate relationship, implicitly conditioned on assistance with graduate school applications." The statement does not directly appear in the article. One paragraph notes that "Wentworth had also repeatedly promised to leverage his connections in the field and help her get into graduate programs," concluding with the words "according to the complaint." Another section of the article states, "*According to the complaint*, the professor repeatedly called her 'honey' and 'honey bear' and put his hands on hers while complimenting her and staring intensely into her eyes. [¶] He also *allegedly* suggested that he wanted to pursue a romantic relationship with her as soon as she graduated. [¶] 'I will always honor professor-student boundaries,' he said, *according to the complaint.* 'Once you graduate, that's an entirely different scenario. I look forward to the day when you graduate. . . . but until then, just know that I will never come onto you or make you feel uncomfortable. Got that, honey?' " (Italics added.) This makes it clear that to the extent the statement was made by Hemenway, it was privileged under Civil Code section 47, subdivision (d) as a fair and true report of what was alleged in the DFEH complaint.

9. Statements D1 & D2

Statements D1 and D2 come from the article in the Daily Californian. With respect to D1, the first amended complaint alleges, "The article quotes Hemenway as saying that she 'felt uncomfortable around Wentworth and wanted to skip her graduation ceremony in order not to see him.' " Statement D2 is "Hemenway was 'placed in fear of entering the Berkeley campus, prevented from fully completing her honors thesis and her ability to be accepted into graduate school in her chosen field of South Asian Study was harmed.' " These statements were preceded in the article by the sentence, "In a lawsuit

filed May 19 [referring to the DFEH complaint], Nicole Hemenway, who graduated in 2015, revealed a detailed account of her relationship with Blake Wentworth, her former thesis advisor and South and Southeast Asian studies professor. She accused Wentworth of sexual harassment—alleging instances of inappropriate comments, physical contact and unprofessional behavior." The statements were absolutely privileged under the fair and true reporting privilege of Civil Code section 47, subdivision (d).

10. Statement G1

This leaves statement G1, namely, " 'Wentworth's 'treatment of [Hemenway] and his sexual advances derailed her studies.' " The trial court concluded that Wentworth had a reasonable probability of prevailing because although the question of whether Wentworth's behavior "derailed [Hemenway]'s studies" appeared to be a subjective opinion rather than a statement of fact, Wentworth has denied making "sexual advances" and that was a provable assertion of fact.

We agree with the trial court that the statement that Wentworth's conduct "derailed" Hemenway's studies was a statement of opinion. (*Campanelli, supra,* 44 Cal.App.4th 577–580.) It also mirrored Statement G3, that the DFEH complaint alleged Wentworth made it challenging for her to finish school, which we have previously concluded must be stricken because it amounts to a statement of opinion and is absolutely privileged. Hemenway was entitled to make Statement G3, and Wentworth has not adequately explained how he could have been damaged by the additional assertion that her studies were "derailed" under Statement G1. (See *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 616–-619 [judicial candidate did not establish prima facie case because she does not explain how her reputation was damaged by alleged breach of contract].)

Similarly, although false accusations of conduct amounting to sexual harassment can be defamatory if they are untrue (and are accusations of fact, versus an alleged victim's perception and opinion that certain undisputed but ambiguous acts amount to sexual harassment; cf. *Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 690–692 [alleged lie regarding whether rape occurred]), we must view the complaint under the totality of

the circumstances. (*ZL Technologies, Inc. v. Does 1–7* (2017) 13 Cal.App.5th 603, 624.) Under this test, which can cut either way, " ' "[A] court must put itself in the place of an average reader and determine the natural and probable effect of the statement. . . ." [Citation.] Thus, a court considers both the language of the statement and the context in which it is made.' " (*Ibid*.) Here, Hemenway's statements to the Guardian UK were in part privileged, true, and/or unactionable statements of opinion, and readers would permissibly learn that she had accused Wentworth of holding her hand, calling her "honey" and "honey bear," suggesting he wanted to pursue a romantic relationship after she graduated, and sending her intimate email messages detailing his private life. The additional information that she had accused him of making "sexual advances" was redundant and therefore not likely to harm his reputation.[7]

11. Conclusion

We emphasize that we are not here called upon to assess the merits of Hemenway's sexual harassment claim. Rather, we are asked to determine whether Wentworth's cause of action for defamation—along with the redundant claims for false light invasion of privacy and intentional infliction of emotional distress based on the same conduct—can go forward despite the anti-SLAPP statute. We conclude, for the reasons stated above, that they cannot. The entire first amended complaint should be dismissed.[8]

III. DISPOSITION

The order is affirmed to the extent it grants the anti-SLAPP motion in part and reversed to the extent it denies the motion as to the remaining allegation and three causes of action. On remand, the trial court shall enter a new order granting the motion in its

[7] Our conclusion makes it unnecessary to consider Hemenway's suggestion, raised in a footnote of her opening brief, that UCSF's finding after an administrative hearing that Wentworth committed sexual harassment is binding.

[8] We deny as unnecessary Wentworth's request, filed March 26, 2019, that we take judicial notice of a second complaint filed by Hemenway with the DFEH on February 4, 2017, alleging the instant action is retaliatory.

entirety. Hemenway may file a request for attorney fees in the trial court. (See § 425.16, subd. (c)(1); *Bleavins v. Demarest* (2011) 196 Cal.App.4th 1533, 1543–1544.) Hemenway is also entitled to costs on appeal. (*Id*. at p. 1544.)

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.